

Reflections on the African Court on Human and Peoples' Rights

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1 Introduction

In June 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol) was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso. With the deposit of the 15th instrument of ratification by the Union of Comoros on 26 December 2003, the requisite number of ratifications were received by the Chairperson of the African Union (AU) Commission in Addis Ababa, allowing the Protocol to enter into force on 25 January 2004.¹

It is fair to observe that there has been a significant level of reluctance on the part of member states to ratify the Protocol. It took five years for the African Charter on Human and Peoples' Rights (African Charter or Charter) to come into effect. It took nearly six years before the Protocol came into effect, and it may take even longer for the African Human Rights Court to be established. It is necessary to examine the reasons for this prevarication.

As a way of addressing the issue, it may be necessary to recall that the pressure for the establishment of the Court came first, back in 1961, from African jurists via the Law of Lagos process. Although it was envisaged at the beginning that the African Charter would have a commission and a court, it was later decided to concentrate on the establishment of an African Commission on Human and Peoples' Rights (African Commission or Commission). Further activity was generated by

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¹ See <<http://www.africa-union.org>> (accessed 31 January 2004).

international human rights non-governmental organisations (NGOs) such as the Geneva-based International Commission of Jurists (ICJ), who prepared the early drafts of the Protocol, the first of these actually tabled in 1993. The driving force was the view, widely held among NGOs and human rights experts and a result of observing the work of the African Commission over the five years of its existence, that the Commission was largely ineffectual, and that a court would give it teeth and a higher degree of effectiveness. It is noticeable that the African Commission, itself, did not initiate any of these activities, although the Commission was apparently being consulted by the ICJ in its activities in this regard. The Commission, however, adopted the Addis Ababa draft of 1993, but I can find no resolution of the African Commission committing itself to the Court before 1998.²

At the 30th Ordinary Summit of the OAU in 1994, the Assembly of Heads of State and Government of the OAU adopted a resolution calling on the Secretary-General to establish a Committee of Government Experts to 'ponder in conjunction with the African Commission on Human and Peoples' Rights over the means *to enhance the efficiency* of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights'.³ Consequent upon some rather rapid moves, the first direct OAU involvement was noticed at the Cape Town Meeting of Government Experts in September 1995. Further reluctance was manifested, however, when only three states made comments on the Cape Town draft. Further meetings of experts were convened, and in 1997 the Addis Ababa draft was presented to the Assembly. It was adopted at Ouagadougou on 9 June 1998. Thereafter, a very slow process led to the adoption of the Protocol. As observed above, the African Commission, itself, showed no signs of enthusiasm for this project and they may have contributed to the mood of grudging acceptance of the concept and, later, of the Protocol itself.

The Protocol was quickly signed by some 30 states within the year following its adoption. Despite being urged annually by resolutions of the Summit, ratifications of the Protocol were very hard to come by.

2 Human rights developments in Africa

2.1 The Constitutive Act of the African Union

Some promise was beginning to be shown on the continent by further developments. The Constitutive Act of the African Union was adopted at

² Its first resolution in this regard is an appeal to states to ratify the 1998 Protocol. See Resolution on the ratification of the Additional Protocol on the Creation of the African Court on Human and Peoples' Rights, adopted at its 24th session in October 1998.

³ Resolution on the African Commission on Human and Peoples' Rights in C Heyns (ed) *Human rights law in Africa 1999* (2002) 139.

Lomé, Togo, in 2000. Ratifications of the Act were swift to the point that the inaugural session of the AU was held in Durban, South Africa, in July 2002. Significantly, the Constitutive Act, 2002, is very strong on the human rights principles set out in the African Charter. One of its objectives is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments . . .'⁴ and among its principles it entrenches 'respect for democratic principles, human rights, the rule of law and good governance . . .'.⁵ One can, therefore, argue that the adoption of the Constitutive Act was a significant contributor to establishing an environment conducive to the adoption of the Protocol.

But that was not to be. One suggestion may be that, ironically, the Constitutive Act itself was confusing to states regarding the relationship between the Act and its agencies, and the place of the African Commission and, by extension, the Court itself. The Act establishes a Court of Justice whose jurisdiction is set out in the Protocol on the African Court of Justice adopted at the Maputo Summit in July 2003.⁶ The Act is silent on the African Commission and on the proposed African Court on Human and Peoples' Rights.⁷ It is, however, generally accepted that the court of justice will become the main instrument for the interpretation of the Constitutive Act and for the resolution of disputes arising between states in terms of the Act. It is a situation akin to the relationship between the European Court of Human Rights and the European Court of Justice, which can be said to be complementary as regards human rights matters. But to many African states this relationship is not easy to comprehend. For example, the relationship between the African Court and the Court of Justice will have implications on which jurisdiction has bearing on the domestic situation and which court can be accessed, and under what conditions. They can conceive of a conflict of laws within the same legal jurisdiction. For that reason, many states are agitating for clarification and are holding back on ratifying the Protocol on the Establishment of the African Court.

As if that was not enough, the Constitutive Act is silent on the African Commission and the African Human Rights Court. Questions have been asked as to whether the institutions established under the African Charter ought to have been reflected in the Constitutive Act.⁸ So vocal were these questions that the Assembly, both in Lusaka in 2001 and in

⁴ Art 3(h) AU Constitutive Act.

⁵ Art 4(m) AU Constitutive Act.

⁶ See <<http://www.africa-union.org>>. By 31 March 2004, no ratification has been secured.

⁷ See below.

⁸ Note comments by E Baimu 'The African Union: Hope for a better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 312.

Durban in 2002, urged the African Commission to 'propose ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union, and submit a report thereon at the next session of the Assembly'.⁹ To the best of my knowledge, the African Commission has never submitted such a report.

2.2 The lack of enthusiasm of the African Commission about the African Court

The truth is that opinion among members of the African Commission is also mixed. There are some who believe that, as the African Commission was established as a treaty body made up of independent experts under the African Charter, and as the Charter in turn was adopted by the Summit of the OAU under its own rules, the African Commission should have been provided for specifically in the Constitutive Act. Another view is that the African Commission can best serve its tasks inherent in the African Charter and the Constitutive Act by remaining an independent body of experts that accounts for its activities and decisions to the AU, but remains independent as regards its decisions and processes. To be established as a specialised body within the AU, so the argument goes, might compromise its independence.¹⁰

2.3 Questions about sovereignty and constitutionalism

A more serious concern, however, is the relationship of the African Human Rights Court to the domestic situation. There is concern that the Court will undermine domestic courts and as such would be 'unconstitutional', viewed from the domestic perspective. The introduction of an extra-territorial jurisdiction is a concept that has not yet received wide acceptance in Africa. In the European context, it has now become widely established that state parties to the European Convention undertake to abide by the decisions of the European Court and, generally, the orders of the Court are observed.

⁹ Resolution AHG/Dec 171 (XXXVIII). Note also that the Kigali Declaration, adopted by the Second African Ministerial Conference on Human Rights in Kigali, Rwanda on 8 May 2003, reinforced these constant appeals and went on to express the hope that the Protocol would 'come into force by July 2003 as required by Dec AHG/Dec 171 (XXXVIII)'.

¹⁰ See Resolution of the Assembly of Heads of State and Government of the OAU at the 37th ordinary session held in Lusaka, Zambia in July 2001 which 'encourages the African Commission to continue to pursue its reflection on the ways and means of reinforcing the African human rights system within the framework of the African Union . . . '.

3 Understanding the jurisprudence of the African Commission

The situation, once the African Human Rights Court has been established, will not be substantially different from that which obtains currently with respect to the African Charter of which all African states, members of the AU, are parties. Although the African Commission does not enjoy the authority of a court, the Commission nonetheless has had to remind states in recent judgments that, in terms of article 1, states undertook to 'recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.¹¹ Much earlier, the African Commission recommended a formula for consideration by states on how they could introduce into their constitutions, laws, rules, regulations and other acts relating to human and peoples' rights, the provisions in articles 1 to 29 of the African Charter.¹²

It should also be noted that, according to the Vienna Convention, states cannot legitimately resort to domestic law in order to avoid their obligations in terms of international treaties they are party to. At the same time, a treaty body does not have a duty to interpret municipal law as that remains the competence of the domestic courts. What the treaty body can do is simply to determine whether a state party to the Charter has complied with its treaty obligations. In *Legal Resources Foundation v Zambia*,¹³ the African Commission ruled that 'international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on state parties . . .'. The jurisdiction of the African Commission therefore is that state parties to the Charter are bound by their treaty obligations as interpreted by the African Commission in the execution of its mandate.

¹¹ Art 1 African Charter.

¹² By resolution at the 5th ordinary session in 1989. In the communications against Zambia, in the *Amnesty International* matter, the Commission ruled that states should not easily resort to claw-back clauses as 'recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter'.

¹³ Communication 211/98, Fourteenth Annual Activity Report. See also the Mauritania cases (*Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000)) where the Commission found that '[i]t is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter'. In a series of cases against Nigeria, the Commission found that the ouster clauses and the prevailing military regime meant that domestic remedies were not available to be exhausted.

4 Ensuring a more effective African human rights system

The African Commission's decisions lack enforceability as they are not judicial decisions. Also, too many of the Commission's decisions are ignored routinely by states. The Commission lacks not only the authority to enforce its own decisions, it also does not have the resources to undertake follow-up activities and monitor compliance with its decisions. The matter could be placed before the Assembly, but the Assembly itself has not so far had any legislative framework by which it can demand compliance from member states.

To some degree, the Constitutive Act provides just such a framework. This is even more so if the Constitutive Act is read with the New Partnership for Africa's Development (NEPAD), especially the African Peer Review Mechanism.¹⁴ The Constitutive Act, especially in article 4, not only affirms the 'sovereign equality and interdependence' of states and the sanctity of national boundaries and 'non-interference by any member state in the internal affairs of another . . .',¹⁵ but also, as mentioned, requires the promotion and protection of human rights as one of its objectives. Of course, these positions are contradictory, but they do reflect some of the ambiguities of current international law where national jurisdiction has been severely tempered by international treaty law. The Constitutive Act provides for relevant sanctions against states that fail to comply with the Act and, in article 30, 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.

5 The African Court: Its powers and jurisdiction

The Protocol clearly asserts that the African Human Rights Court will *complement* the protective mandate of the African Commission. 'Complement' must surely be understood to mean that it will reinforce and make more complete the objectives of the Charter. That suggests

¹⁴ The Declaration on the Implementation of NEPAD (AHG/235 (XXXVIII)), dated 18 June 2002, expresses support for 'the African Charter, the African Commission and the Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights . . .' and among the stages of the African Peer Review Mechanism it includes a fifth stage where 'six months after the report of the APRM has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, . . . and the envisaged Peace and Security Council and the Economic, Social and Cultural Council (ECOSOCC) of the African Union . . .'.

¹⁵ Arts 4(a) & (g) Constitutive Act.

that both the Court and the Commission will coexist as independent bodies but within a mutually reinforcing relationship. By reason of its status as a court, the African Court will be the final arbiter and interpreter of the African Charter.¹⁶ The jurisdiction of the Court is confined to the interpretation and application of the African Charter and any other international human rights instruments *ratified by the states concerned*.¹⁷ For me this serves as a limitation. It means that the Court will only entertain hearing matters that are demonstrably and *prima facie* within the mandate of the Court. It does not hear matters or disputes relating to the Constitutive Act, nor does it entertain disputes between states, say border disputes, unless such disputes can be categorised as human rights disputes, as was the case in the communication from the *Democratic Republic of Congo v Rwanda, Burundi, Uganda*.¹⁸ It would not be within the competence of the court to impose a treaty obligation on states that have not assumed the duty by themselves.¹⁹

The provision on *locus standi* has been one of the most debated issues. Although NGOs have played a very critical role in supporting the work of the African Commission over the years and can claim responsibility for many of the Commission's most progressive initiatives, it is noticeable that individuals and NGOs do not have direct recourse to the Court. When it comes to the right of direct recourse to the Court of NGOs *with observer status before the Commission* and individuals (article 5(3)), state parties must have made a declaration to that effect in terms of article 34(6) of the Protocol. This provision states that 'at the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol . . .'. In the absence of any such declaration, individuals have to submit their complaints first to the African Commission, as in the past. The effect is to limit access to the Court over and above the prevailing limitations, such as exhaustion of domestic remedies, which already serve to keep out of the ambit of the Court any matters which could have been dealt with domestically. This device in international law, however, should not serve to frustrate

¹⁶ See Ibrahim Ali Badawi el Sheikh 'The future relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 252.

¹⁷ Art 7 Protocol (my emphasis).

¹⁸ Communication 227/99. Two other similar communications were regrettably camouflaged as art 55 communications instead of the inter-state communications under art 47. These are Communication 233/99, relating to the Ethiopia/Eritrea dispute, and Communication 157/96, against Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, relating to the sanctions imposed by these states against Burundi following the declaration of a military *coup d'état* in that country.

¹⁹ See RW Eno 'The jurisdiction of the African Court of Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223 and K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

legitimate access to the treaty body but to give an indication of the state party's effort and opportunity to address the matter within its own legal jurisdiction. In addition, the treaty body should not be used as a court of first instance, especially on matters it is not competent to determine, such as matters of evidence. It is interesting to note that only one state has made such a declaration to date.²⁰ In any event, these provisions make the advocacy role of the Commission very prominent.

Having outlined the ways in which the jurisdiction of the Court is limited ostensibly so as not to unduly violate the sovereignty of member states, it is now necessary to address the question of the domestic application of its rulings, orders and judgments. It is a trite principle of international law that the rulings of any trans-national jurisdiction cannot have any 'cassation effect, nor may it directly annul or repeal any law or judgment or administrative acts by the state concerned which it considers inconsistent with, or in violation of, any international instrument'.²¹ Such rulings could be declaratory in nature, or mere denunciations, but they cannot by themselves directly set aside or nullify the rulings of domestic courts. It is not the duty of the international body to substitute its own opinion for that of any domestic court. It is not a court of appeal from national courts. Insofar as the states are parties to the Charter, the rulings of a transnational tribunal are directed at the state. It is the state that must abide by its treaty obligations and it is the state that must bring its domestic laws into conformity with its international treaty obligations. International human rights law, accordingly, plays a powerful persuasive and authoritative role in domestic jurisprudence.

It is very important that the judgments of the African Court be obeyed and its rulings given effect to. The state parties to the Protocol undertake, in terms of article 30, 'to comply with the judgment in any case where they are parties within the time stipulated by the Court and to guarantee its execution'.²² In other words, the states take primary responsibility for the execution of the judgments of the Court. Should the affected states fail to do so, other persuasive and coercive means are available to the AU. The Court submits its reports to the regular session of the Assembly,²³ and the provision goes on to state that the report must 'in particular, specify the cases in which a state has not complied with the Court's judgment'.²⁴ This is an important provision, because it transfers

²⁰ Burkina Faso has made the art 34(6) declaration.

²¹ See NB Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' Inaugural Lecture as Professor of Law at the University of South Africa, 12 August 2003; see (2003) 28 *South African Yearbook of International Law* 110.

²² Art 30 Protocol (my emphasis).

²³ Art 31 Protocol.

²⁴ As above.

the secondary responsibility for ensuring compliance with the rulings of the Court to the collective body of the Heads of State and Government. This could serve as a kind of peer review mechanism.²⁵ As a monitoring mechanism, the judgments of the Court are notified not only to the parties in the dispute but also to the Council of Ministers who shall 'monitor its execution on behalf of the Assembly'.²⁶

6 Concluding remarks

International obligations are binding on all states and states cannot retreat behind their domestic laws to avoid their duties under international law. The decisions of the African Commission have all along been just as binding on states, as article 1 of the Charter demands. The Commission, however, lacks the enforcement mechanisms necessary for monitoring and executing its decisions of the magnitude provided for in the Protocol for the African Court. This has been a major limitation on the effectiveness of the African Commission.

The establishment of the Court comes at a time when the human rights, good governance and democracy landscape in Africa is underpinned by an appreciable framework of African instruments such as the Constitutive Act, 2000, NEPAD and especially the African Peer Review Mechanism. Yet there has been reluctance on the continent to ratify the Protocol, and it is yet to be seen how far the political will of the Assembly will go, especially when the election of judges to the Court takes place, resources for the effective functioning of the Court are allocated and judgments of the Court are executed. Some of the reluctance, I believe, has been due to a lack of adequate understanding of the role of the Court in domestic jurisdictions. It is argued that the Court will not be a court of appeal from municipal courts, as domestic remedies must be exhausted before a matter can be admissible before the African Court. The Protocol also limits direct access to NGOs with observer status in the African Commission (that itself being a limitation on NGOs who can approach the Court) and individuals, provided that the state party concerned has complied with the provisions of article 34(6) of the Protocol.

²⁵ Note that the African Peer Review Mechanism provides that once the report has been submitted to the Heads of State and Government, and the government makes a commitment to rectify the faults identified, the state will receive assistance. If, however, the state shows reluctance or unwillingness to correct the blemishes identified, constructive dialogue will be engaged in with the state concerned, failing which 'the participating Heads of State and Government may wish to put the government on notice of their collective intention to proceed with appropriate measures by a given date . . . '.

²⁶ Art 29(2) Protocol.